80-942

No. .....

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

In Re

JOHN M. SHAHEEN,

Petitioner below,

—against—

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK (HONORABLE RICHARD OWEN, UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF NEW YORK),

Respondent below.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Of Counsel

QUESTIONS PRESENTED

1. Whether the Federal District Court for the Southern District of New York exceeded its jurisdictional powers and violated petitioner's basic constitutional due process rights in denying petitioner's motion to dismiss the proceedings below on the ground that his adversary had failed to state a claim upon which relief could be granted and in permitting his adversary to proceed against him to trial on the basis of a jurisdictionally defective pleading?

2. Whether the Court of Appeals for the Second Circuit erred in declining to issue a Writ of Mandamus directing the District Court to dismiss the subject jurisdictionally defective pleading?

THE PARTIES BELOW

The parties to the Mandamus proceeding before the Court of Appeals of the Second Circuit were:

1. John M. Shaheen, the party seeking the Writ of Mandamus;

2. The United States District Court, Southern District of New York (Honorable Richard Owen, United States District Judge for the Southern District of New York);

3. The Clarkson Company Limited, the judgment creditor which had instituted a supplementary proceeding in the District Court against Shaheen, the judgment debtor, and one Martin Rubin;

4. Martin Rubin, escrowee of the collateral sought by Clarkson Company Limited in said supplementary proceeding; and

5. Macmillan Ring Free Oil

Company, Inc., a claimant to said collateral, which intervened in the Mandamus proceeding.

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No.

In Re

JOHN M. SHAHEEN,

Petitioner below,

-against-

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK (HONORABLE RICHARD OWEN, UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF NEW YORK),

Respondent below,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, John M. Shaheen, respectfully prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit entered on December 4, 1980.

In said decision, the Second Circuit dismissed Shaheen's Petition for a Writ of Mandamus directing the District Court, Southern District of New York, to dismiss a supplementary proceeding instituted by The Clarkson Company Limited, as judgment creditor, against, inter alia, John M. Shaheen, as judgment debtor, on the ground that said proceeding was predicated upon a jurisdictionally defective pleading or petition.

OPINION BELOW

There was no opinion issued by the Second Circuit. The memorandum opinion of the District Court appears in Appendix C, infra.

JURISDICTION

The decision of the Court of Appeals was entered December 4, 1980. This petition was timely filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 28 U.S.C. 1651.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOKED

1. Constitution of the United States, Amendment XIV, §1...nor shall any state deprive any person of life, liberty or property without due

process of law...

2. New York Civil Practice Law and Rules Section 5225(b) appears in Appendix "A", infra.

STATEMENT OF THE CASE

The facts and circumstances from which this controversy arises are not in dispute.

By order to show cause, petition and supporting papers dated October 2, 1980, The Clarkson Company Limited ("Clarkson") instituted a supplementary proceeding in the United States District Court for the Southern District of New York (Richard Owen, J.), pursuant to Federal Rule of Civil Procedure 69 (a) and New York State Civil Practice Laws and Rules5225(b) ("CPLR 5225(b)"), in aid of the enforcement of a federal money judgment entered on its behalf in a civil

action on July 22, 1980*.

Pursuant to said proceeding, Clarkson sought an order requiring petitioner herein, John M. Shaheen ("petitioner" or "Shaheen"), to turn over to Clarkson certain stock which petitioner owns but which, in March 1977, more than three years previously, petitioner had pledged to a third party, Macmillan Ring Free Oil Company, Inc. ("MRFO"), to secure the repayment of a debt ("Pledged Stock"). The Pledged Stock, at the time Clarkson commenced its supplementary proceeding and at present, is held in a purely custodial and non-proprietary capacity by a third

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* The subject supplementary proceeding is governed by the state law of New York pursuant to F.R.C.P. 69(a). Clarkson's claim of federal jurisdiction was based upon diversity of citizenship and ancillary jurisdiction.

party escrowee, Martin Rubin, Esq. ("escrowee"), pursuant to the terms of the subject pledge.

At the time Clarkson instituted the subject supplementary proceeding, it was fully aware of the subject pledge and of the fact that Martin Rubin, escrowee, held the Pledged Stock in a purely custodial capacity on behalf of MRFO, the pledgee.

However, despite its knowledge of the underlying pledge, Clarkson failed to name the pledgee, MRFO, as a party in the subject proceeding. It chose to seek relief only against petitioner, who holds legal title to the Pledged Stock, and Rubin, the nominal escrowee of the Pledged Stock.

A. The Statutory Basis for the Supplementary Proceeding

CPLR 5225(b), the statute upon which the subject proceeding is predicated, provides in relevant part that a judgment creditor (here Clarkson) may procure property in the hands of a third party in which its judgment debtor (here Shaheen) has an interest only if:

> "it is shown that the judgment debtor is entitled to the possession of such property or that the judgment creditor's rights to the property are superior to those of the transferee."*

The "transferee" in the case at bar, for purposes of CPLR 5225(b), is Macmillan Ring-Free Oil Company, Inc. to whom the subject stock was pledged to secure the repayment of a debt. Martin Rubin, the escrowee pursuant to

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* A copy of the complete text of CPLR 5225(b) appears in Appendix "A", infra.

the subject pledge, has a purely custodial and non-proprietary interest in the stock.

B. The Allegations of Clarkson's Petition

The petition of Clarkson, pursuant to which the subject proceeding was commenced, fails to allege either:

(a) that the judgment debtor (Shaheen) is entitled to the possession of the Pledged Stock; or

(b) that the judgment creditor (Clarkson) possesses rights in the Pledged Stock superior to those of MRFO, the pledgee of the Pledged Stock to whom it was transferred pursuant to the March 1977 pledge.

In fact, the only substantive allegation in Clarkson's petition is that "Martin Rubin, an attorney-at-law, has possession or custody of [the

Pledged Stock] belonging to the judgment debtor John M. Shaheen..."* There is simply no other substantive allegation in Clarkson's petition.

C. Petitioner's Motion Below to Dismiss the Petition for Failure to State a Claim upon which Relief Can Be Granted

On November 7, 1980, petitioner moved the District Court (S.D.N.Y.) (Richard Owen, J.) for an order, inter alia, pursuant to F.R.C.P. 12, dismissing the petition of Clarkson for failure to state a claim upon which relief could be granted.

The basis for the motion was that Clarkson had failed to make any factual allegation which would, if proven, have

* Clarkson's Petition, paragraph 9 thereof. Copies of the entire Petition and copies of the accompanying Order to Show Cause and supporting affidavit appear in Appendix "B", infra.

entitled it to relief under CPLR 5225(b). More particularly, it was argued that Clarkson failed to allege the basic jurisdictional fact that must be set forth in order to state a claim under CPLR 5225(b), to wit:

> that the judgment debtor is entitled to the possession of such property or that the judgment creditor's rights to the property are superior to those of the transferee. (Emphasis added.)

As noted above, although Clarkson alleged that petitioner possessed legal title to the Pledged Stock, it absolutely failed to allege that he was entitled to possession thereof - such right to possession, it was argued, is the true jurisdictional test.

D. The District Court's Disposition of the Motion

On November 7, 1980, at a hearing before the District Court on another

matter, courtesy copies of the moving papers and Memorandum of Law were given to the District Court. The District Court immediately denied the subject motion to dismiss from the bench without even reading petitioner's papers in support of the motion. No papers had yet been submitted in opposition to the motion, and indeed, the motion was not even returnable until November 21, 1980. The District Court gave no reason for its denial of the motion except the following:

"THE COURT: --you know, for six years I have been on this bench looking at complaints where people move to dismiss them. I've looked at this complaint, this petition. I conclude that there is sufficient there to withstand a motion to dismiss. So that

motion is denied."*

By letter dated November 14, 1980, counsel for petitioner sought reconsideration of the District Court's decision. The District Court responded as follows:

> "I have again reviewed Clarkson's petition. It states a claim whether the possessory interest of Macmillan Ring-Free, asserted as a defense, is valid and enforceable under the circumstances of the pledge and Mr. Shaheen's ownership position in Macmillan are issues to be tried in the expedited hearing I have ordered. The application for reconsideration is therefore denied. So ordered, Richard Owen, U.S.D.J., 11/19/80."**

Quite clearly, the District Court's above noted response does not constitute a valid application of the

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* Transcript of proceeding held before the District Court on November 7, 1980, p.30.

** A copy of the subject letter upon the face of which the District Court wrote its memorandum opinion appears in Appendix C, infra.

law. The Court clearly states that the petition states a claim because of what is asserted, by way of defense, in an answer to the petition. This finding turns a basic rule of law on its head; namely, that a pleading must be judged on its face and must contain allegations which, if proven, would support the entry of judgment as prayed for. No such allegations are made in Clarkson's petition.

E. Petitioner's Writ of Mandamus to the Court of Appeals for the Second Circuit

Subsequently, on December 1, 1980, petitioner applied to the Court of Appeals for the Second Circuit for a Writ of Mandamus directing the District Court to dismiss Clarkson's petition. The Second Circuit granted oral argument of the Mandamus petition, which

was held December 3, 1980. On December 4, 1980, the Second Circuit dismissed the Mandamus Petition without opinion.

The instant application follows.

REASONS FOR GRANTING THE WRIT

Petitioner John M. Shaheen respectfully submits that this petition should be granted because the Second Circuit has sanctioned judicial proceedings in the District Court which so far depart from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

More particularly, it is respectfully submitted that the Second Circuit permitted the District Court to grossly and unconstitutionally exceed its jurisdictional powers in per-

mitting Clarkson to proceed to discovery and trial on the basis of a pleading which lacks jurisdictionally requisite allegations. The allegations of the subject pleading would, even if proven, entitle Clarkson to no relief.

Finally, the pleading provides no constitutional due process notice to petitioner as to the actual claims which Clarkson intends to assert against him. That is to say, the District Court has permitted the subject proceeding to continue in violation of petitioner's basic due process rights to be confronted with the factual allegations against him.

ARGUMENT

I.

THE DISTRICT COURT HAS REFUSED TO ABIDE BY WELL SETTLED PRINCIPLES OF LAW

The law is clear beyond peradventure that a pleading must be judged on its face and that it must be dismissed as a matter of law if it fails to state a claim upon which relief may be granted.

It is equally clear that Clarkson's petition does not state a claim because it simply fails to state any cause of action against anyone. No factual allegations are asserted which, if proven, would entitle Clarkson to judgment.

The basic facts underlying Clarkson's Petition are set forth

above. Clarkson, in 1980, seeks the "turn-over" of stock which petitioner pledged to MRFO in 1977 to secure the repayment of a debt.

As is noted above, CPLR 5225(b), the statutory predicate for Clarkson's petition, requires that Clarkson plead and prove one of two factual assertions if it is to state a claim pursuant to CPLR 5225(b):

(a) that petitioner Sheheen is entitled to possession of the Pledged Stock; or

(b) that Clarkson possesses rights in the Pledged Stock superior to those of MRFO, the pledgee.

In other words, CPLR 5225(b) recognizes that Clarkson stands in the shoes of Shaheen and possesses no greater rights in property in which Sheheen has an interest than Shaheen himself possesses.

Neither of the required allegations is made by Clarkson.

Indeed, assuming arguendo the validity of the subject 1977 pledge, which Clarkson does not attack in its petition, the law is settled that:

(a) the judgment debtor, Shaheen, is not entitled to the possession of the Pledged Stock; and

(b) the third party pledgee, MRFO, has rights in the Pledged Stock superior to those of either Shaheen or Clarkson. Cohen v. First National City Bank, 49 Misc.2d 141, 267 N.Y.S.2d 146 (Civil Ct., N.Y.Co. 1966); Leumi Finance Corp. v. Sydler, et al., 60 Misc.2d 1021, 304 N.Y.S.2d 988 (Sup.Ct. Nassau Co. 1969).

Thus, in the absence of allegations attacking the subject pledge, it would be an impossibility for Clarkson to plead factual allegations sufficient to

state a claim under CPLR 5225(b).

However, Clarkson has made absolutely no factual allegation or factual showing, in his petition, that the subject pledge is in any way fraudulent or improper. Not has Clarkson set forth any other claim of actionable wrongdoing in connection with the subject pledge in its petition.

Thus, Clarkson has failed to state a claim in its supplementary proceeding petition pursuant to CPLR 5225 upon which relief can be granted. It has failed to allege the jurisdictional predicate upon which a CPLR 5225 claim must be based.

The fact that the escrowee of the Pledged Stock, Martin Rubin, holds the stock in a purely custodial capacity and lacks a proprietary interest therein is entirely irrelevant under

CPLR 5225(b). That is to say, the fact that the escrowee has a purely custodial interest in the stock does not mean that Shaheen has a possessory interest in the stock, which is the true jurisdictional test.

Thus, it is incontrovertable that the lower court has exceeded its jurisdictional powers in permitting Clarkson to proceed on the basis of a grossly defective petition.

Parenthetically, it is observed that one possible reason Clarkson failed to join MRFO, the pledgee of the Pledged Stock, and failed to attack the pledgee itself in its petition is that had it done so federal diversity jurisdiction might have been destroyed and Clarkson would have been forced to proceed in state court which, for its own reasons, it did not want to do. In

effect, it was attempting to "bootstrap" itself into federal court.

II.

THE SECOND CIRCUIT ERRED IN FAILING TO ISSUE A WRIT OF MANDAMUS

28 U.S.C. 1651 provides as follows:

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.
>
> (b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

The law is settled that a Writ of Mandamus is proper to curb a lower court when it has exceeded its jurisdictional powers.

Thus, in Roche v. Evaporated Milk,

319 U.S. 21, 26 (1942), this Court stated as follows:

> "The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction."

Likewise, in American Airlines v. Forman, 204 F.2d 230, 232 (3rd Cir. 1953), the Third Circuit indicated that mandamus is particularly proper where "the challenged assumption or denial of jurisdiction must be so plainly wrong as to indicate failure to comprehend or refusal to be guided by unambiguous provisions of a statute or settled common law doctrine".

It is submitted that the District Court below has engaged in an unauthorized exercise and usurpation of power which justifies the invocation

of an extraordinay remedy.

Finally, it is noted that this Court possesses power not only to grant certiorari to review the decision of the Second Circuit but also possesses plenary power, pursuant to 28 U.S.C. 1651, to directly issue a Writ of Mandamus to the District Court. Ex Parte Peru, 318 U.S. 578 (1943).

Petitioner proceeds herein by certiorari because, in any event, the decision of the Second Circuit must, in effect, be reviewed.

III.

MANDAMUS WAS REQUIRED BELOW BECAUSE THERE EXISTS NO OTHER MEANS TO PREVENT POSSIBLE IRREPARABLE INJURY

The denial of petitoner's motion to dismiss by the District Court below

is not appealable until merged in a final judgment.

It was and is the intention of the District Court to expedite discovery below and hold a trial the week of December 15-19, 1980.

Thus, the reason Mandamus was required below is that petitioner has a legitimate fear that the District Court may well persist in its refusal to grant him due process and may enter judgment against him directing the escrowee to turn over the Pledged Stock.

Should the District Court order the Pledged Stock "turned over", petitioner would have no basis upon which to stay such an order pending appeal in view of the fact that he is in no position to post a bond or otherwise deliver adequate security.

Thus, if petitioner were ordered to "turn over" the Pledged Stock to Clarkson, he would suffer irreparable injury which could not be vindicated or cured by a reversal on appeal. The Pledged Stock would already be gone.

CONCLUSION

Clarkson's Petition is jurisdictionally defective under CPLR 5225(b). Clarkson is required to allege facts establishing that Shaheen is entitled to possession of the subject stock in order to state a claim pursuant to CPLR 5225(b). It has absolutely failed to do so.

The District Court and the Second Circuit have sanctioned a gross violation of petitioner's basic due process rights in permitting Clarkson

to engage in discovery and proceed to trial on the basis of a jurisdictionally defective petition.

For the reasons stated above, a Writ of Certiorari should issue to review the decision of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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Of Counsel

SUPPLEMENTARY APPENDIX

ORDER OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT OF WHICH REVIEW IS SOUGHT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fourth day of December, one thousand nine hundred and eighty.

In re John M. Shaheen,

Petitioner.

The Clarkson Company Limited, as trustee in bankruptcy,

Plaintiff,

v.

John M. Shaheen, Roy M. Furmark, et al.,

Defendants.

The Clarkson Company Limited,

Petitioner below,

v.

Martin Rubin and John M. Shaheen,

Respondents below.

Martin Rubin,

Interpleading Counter-Claiman below,

v.

Macmillan Ring-Free Oil Co., Inc., and The Sheriff of the City of New York, New York County Division,

Counterclaim Defendants below.

Upon oral argument and the papers submitted the petition of John M. Shaheen for a writ of mandamus is denied and the request for a stay pending determination of the petition is denied as moot.

S/
Hon. James L. Oakes, USCJ

S/
Hon. Thomas J. Meskill, USCJ

S/
Hon. Henry F. Werker, USDJ

APPENDIX

APPENDIX A

CIVIL PRACTICE LAW AND RULES SECTION 5225; PAYMENT OR DELIVERY OF PROPERTY OF JUDGMENT DEBTOR

(b) Property Not in the Possession of Judgment Debtor. Upon a special proceeding commenced by the judgment creditor, against a person in possession or custody of money or other personal property in which the judgment debtor has an interest, or against a person who is a transferee of money or otherpersonal property from the judgment debtor, where it is shown that the judgment debtor is entitled to thepossession of such property or that the judgment creditor's rights to the property are superior to those of the transferee, the court shall require such person to pay the money, or so much of it as is sufficient to

satisfy the judgment, to the judgment creditor, and if the amount to be so paid is insufficient to satisfy the judgment, to deliver any other personal property, or so much of it as is of sufficient value to satisfy the judgment, to a designated sheriff. Costs of the proceeding shall not be awarded against a person who did not disputethe judgment debtor's interest or right to possession. Notice of the proceeding shall also be served upon the judgment debtor in the same manner as a summons or by registered or certified mail, return receipt requested. The court may permit the judgment debtor to intervene in the proceeding. The court may permit any adverse claimant to intervent in the proceeding and may determine his rights in accordance with section 5239.

(c) Documents to Effect Payment or Delivery. The court may order any person to execute and deliver any document necessary to effect payment or delivery. As amended L.1962, c.315, §5; L.1964, c.388,§25.

APPENDIX B

CLARKSON'S ORDER TO SHOW CAUSE, PETITION AND SUPPORTING AFFIDAVIT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE CLARKSON COMPANY LIMITED, as Trustee in Bankruptcy, appointed by the Supreme Court of the Province of Newfoundland, of the Property of Newfoundland Refining Company Limited and Provincial Refining Company Limited,

Plaintiff,

- against -

JOHN M. SHAHEEN, ROY M. FURMARK, ALBIN W. SMITH, PETER L. CARAS, PAUL W. RISHELL, SHAHEEN NATURAL RESOURCES COMPANY, INC., NEWFOUNDLAND REFINING COMPANY LTD., U.S.A., and FOUNDERS CORPORATION,

Defendants.

THE CLARKSON COMPANY LIMITED, As Trustee in Bankruptcy, appointed by the Supreme Court of the Province of Newfoundland, of the Property of Newfoundland Refining Company Limited and Provincial Refining Company

Limited,

Petitioner,

- against -

MARTIN RUBIN and JOHN M. SHAHEEN,

Respondents.

----------X

Index No. 76 Civ. 1373
(R.O.)

ORDER TO SHOW CAUSE

Upon the annexed petition and affidavit of Kevin D. Ashley and the exhibits thereto attached, it is

ORDERED that the respondents show cause at a motion term of this Court, to be held in Room 128, United States Court House, Foley Square, New York, New York on the 24th day of October, 1980 at 2:15 o'clock in the afternoon of that day, or as soon thereafter as counsel can be heard why an order, pursuant to Rule 69(a), F.R.Civ.P.,

and CPLR 5225(b) and (c), should not be made herein:

(A) granting that judgment be entered against the respondent Martin Rubin requiring him to deliver to a receiver, if one is appointed by the Court on motion of The Clarkson Company Limited, or if none is appointed, to the Sheriff of the City of New York, New York County Division, all property in his possession or control in which John M. Shaheen has a proprietary interest including the following described property:

(1) 896,047 shares of stock of Can-Amera Export Refining Company Ltd.;

(2) 30,000 shares of preferred stock and 252,248 shares of common stock of SNR Holdings, Inc.;

(3) 100 shares of stock of Shaheen Natural Resources Co., Inc.;

(4) 207,343 shares of stock of

Founders Corporation;

(5) 1,371 shares of common stock and 142 shares of preferred stock of Macmillan Ring-Free Oil Co., Inc.; and

(6) 95 shares of stock of Alberta Export Refining Co., Ltd.

(B) directing respondents John M. Shaheen and Martin Rubin to execute and deliver any documents necessary to effect the delivery referred to in item A above; and

(c) granting such other relief as to the Court may seem just and proper, together with the costs and disbursements of this proceeding.

IT IS FURTHER ORDERED that personal service of a copy of this order and of the papers upon which the same is granted, on the said respondents on or before October 22, 1980 by 5:00 p.m. shall be sufficient service of this order.

Dated: October 21, 1980
N.Y.C., N.Y.

S/ Richard Owen
United States
District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE CLARKSON COMPANY
LIMITED, Etc.,

Plaintiff,

- against -

JOHN M. SHAHEEN, et al.,

Defendants.

THE CLARKSON COMPANY
LIMITED, Etc.,

Petitioner,

- against -

MARTIN RUBIN and JOHN
M. SHAHEEN,

Respondents.

(Same caption as shown
on pp. 4a and 5a)

Index No. 76 Civ. 1373
(R.O.)

PETITION TO COMPEL RESPONDENT
TO DELIVER PROPERTY IN WHICH
JUDGMENT DEBTOR HAS INTEREST

(CPLR 5225)

Petitioner, the Clarkson Company Limited ("Clarkson"), as Trustee in Bankruptcy, appointed by the Supreme Court of the Province of Newfoundland, of the property of Newfoundland Refining Company Limited and Provincial Refining Company Limited, states, by its attorneys, White & Case, for complaint against respondents:

1. The matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand Dollars ($10,000.00).

2. Jurisdiction is conferred upon this Court by 28 U.S.C. §1332 by reason of the amount in controversy and the diversity of citizenship and by reason of the principle of ancillary jurisdiction.

3. Clarkson is a corporation

organized and existing under the laws of the Province of Ontario, Canada, where it maintains its principal place of business. Clarkson is licensed by the Superintendent of Bankruptcy of Canada to act as a Trustee in Bankruptcy in the Province of Newfoundland, as well as other Canadian jurisdictions.

4. Newfoundland Refining Company Limited ("NRC") is a corporation organized and existing under the laws of the Province of Newfoundland, Canada, with a registered office at 85 Elizabeth Avenue, St. John's, Province of Newfoundland. On March 12, 1976 NRC was adjudged bankrupt and Clarkson was appointed by the Supreme Court of the Province of Newfoundland as Trustee in Bankruptcy for the property of NRC.

5. Provincial Refining Company Limited ("PRC")is a corporation organized

and existing under the laws of the Province of Newfoundland, Canada, with a registered office at 85 Elizabeth Avenue, St. John's, Province of Newfoundland. On March 12, 1976 PRC was adjudged bankrupt and Clarkson was appointed by the Supreme Court of the Province of Newfoundland as Trustee in Bankruptcy for the property of PRC.

6. Title to all property of PRC and NRC vested in Clarkson as Trustee in Bankruptcy upon its appointment as trustee of the estates of PRC and NRC by the Supreme Court of the Province of Newfoundland.

7. Upon information and belief, the respondents Martin Rubin and John M. Shaheen are citizens of a State of the United States. Mrtin Rubin has a place of business at 122 East 42nd Street, New York, New York.

8. On July 22, 1980, Clarkson, as judgment creditor, recovered a judgment in this action against, among others, John M. Shaheen, judgment debtor, in the amount of $23,151,910, together with interest at the rate of six percent from March 13, 1976, and in the amount of $23,073,793, together with interest at the rate of six percent from July 1, 1980. The judgment is wholly unsatisfied and unpaid.

9. Respondent John M. Shaheen provided written answers to certain questions propounded by Clarkson in an information subpoena issued in this action pursuant to Rule 69(a), F.R. Civ.P., CPLR 5223 and CPLR 5224. From the described answers, it conclusively appears that the respondent Martin Rubin, an attorney-at-law, has possession or custody of property belonging to

the judgment debtor John M. Shaheen including the following specific property:

(1) 896,047 shares of stock of Can-Amera Export Refining Company Ltd.;

(2) 30,000 shares of preferred stock and 252,248 shares of common stock of SNR Holdings, Inc.;

(3) 100 shares of stock of Shaheen Natural Resources Co. Inc.;

(4) 207,343 shares of stock of Founders Corporation;

(5) 1,304 shares of stock of Macmillan Ring-Free Oil Co., Inc.; and

(6) 95 shares of stock of Alberta Export Refining Co., Ltd.

Counsel for respondent Martin Rubin has confirmed in a telephone conversation that Mr. Rubin is in possession of the above-described property as well as an additional 67 shares of common stock and

142 shares of preferred stock of Macmillan Ring-Free Oil Co., Inc., all of which belong to John M. Shaheen.

10. On September 11, 1980, Clarkson issued an execution on the property of John M. Shaheen to the Sheriff of the City of New York. On information and belief, the sheriff served upon the respondent an execution with notice of levy on September 19, 1980 and notice to garnishee on September 30, 1980. Pursuant to CPLR 5222, Clarkson caused a restraining notice to be served on the respondent on September 10, 1980 by certified mail, return receipt requested, and on September 25, 1980 by personal service.

WHEREFORE, the petitioner demands the following relief:

(A) a judgment be entered pursuant to Rule 69(a), F.R.Civ.P., and CPLR

5225(b) and (c) against the respondent Martin Rubin requiring him to deliver to a receiver, if one is appointed by the Court on motion of The Clarkson Company Limited, or if none is appointed, to the Sheriff of the City of New York, New York County Division, all property in his possession or control in which John M. Shaheen has a proprietary interest including the following described property:

(1) 896,047 shares of stock of Can-Amera Export Refining Company, Ltd.;

(2) 30,000 shares of preferred stock and 252,248 shares of common stock of SNR Holdings, Inc.;

(3) 100 shares of stock of Shaheen Natural Resources Co., Inc.;

(4) 207,343 shares of stock of

Founders Corporation;

(5) 1,371 shares of common stock of Macmillan Ring-Free Oil Co., Inc.;

(6) 95 shares of stock of Alberta Export Refining Co., Ltd.

(B) an order be entered directing the respondents John M. Shaheen and Martin Rubin to execute and deliver any documents necessary to effect the delivery referred to in item A above; and

(C) such other relief as to the Court may seem just and proper, together with the costs and disbursements of this proceeding.

WHITE & CASE
Attorneys for
Petitioner

By S/ Jeffrey
A Member of the Firm
14 Wall Street
New York, NY 10005

(212) 732-1040

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE CLARKSON COMPANY
LIMITED, Etc.,

Plaintiff,

- against -

JOHN M. SHAHEEN, et al.,

Defendants.

THE CLARKSON COMPANY
LIMITED, Etc.,

Petitioner,

- against -

MARTIN RUBIN and JOHN
M. SHAHEEN,

Respondents.

(Same caption as shown
on pp. 4a and 5a)

Index No. 76 Civ. 1373
(R.O.)

AFFIDAVIT TO COMPEL RESPONDENT TO DELIVER PROPERTY

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

KEVIN D. ASHLEY, being duly sworn, says:

1. I am associated with the firm of White & Case, attorneys for plaintiff, the Clarkson Company Limited ("Clarkson"), trustee in bankruptcy of Provincial Refining Company Limited ("PRC") and Newfoundland Refining Company Limited ("NRC"). I am familiar with the proceedings herein.

2. I make this affidavit in support of the petition of the plaintiff, pursuant to Rule 69(a), F.R.Civ. P., and CPLR 5225(b) and (c) for an order:

A. granting judgment be entered against the respondent Martin Rubin

requiring him to deliver to a receiver, if one is appointed by the Court on motion of The Clarkson Company Limited, or, if none is appointed, to the Sheriff of the City of New York, New York County Division, all property in his possession or control in which John M. Shaheen has a proprietary interest including the following described property:

1. 896,047 shares of stock of Can-Amera Export Refining Company Ltd.;

2. 30,000 shares of preferred stock and 252,248 shares of SNR Holdings, Inc.;

3. 100 shares of stock of Shaheen Natural Resources Co., Inc.

4. 207,343 shares of stock of Founders Corporation;

5. 1,371 shares of common stock and 142 shares of preferred stock of Macmillan Ring-Free Oil Co., Inc.; and

6. 96 shares of stock of Alberta Export Refining Co., Ltd.;

B. directing the respondents John M. Shaheen and Martin Rubin to execute and deliver any documents necessary to effect the delivery referred to in item A above; and

C. granting such other relief as to the court may seem just and proper, together with the costs and disbursements of this proceeding.

3. Jurisdiction for this special proceeding is based on the principle of ancillary jurisdiction and, as was the case in the main action, on diversity of citizenship. The matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand Dollars ($10,000). Clarkson is not a citizen of any state of the United States. On information and

belief, the respondents John M. Shaheen and Martin Rubin are citizens of a state of the United States.

4. On July 22, 1980, Clarkson, as judgment creditor, recovered a judgment in this action against, among others, respondent John M. Shaheen, judgment debtor, in the amount of $23,151,910, together with interest at the rate of six percent from March 13, 1976, and in the amount of #23,073,793, together with interest at the rate of six percent from July 1, 1980. A copy of the judgment is attached hereto as Exhibit A. The judgment is wholly unsatisfied and unpaid.

5. On September 19, 1980, Clarkson received written answers of John M. Shaheen to an information subpoena dated August 1, 1980 issued in this action pursuant to Rule 69(a),

F.R.Civ.P., CPLR 5223 and CPLR 5224. Though the Court ordered on August 29, 1980 that all of the questions of the information subpoena to Mr. Shaheen be answered within twenty days, i.e., by September 18, 1980, the information subpoena answers were not signed. Copies of the relevant portions of such answers are attached hereto as Exhibit B. As indicated in the covering letter of Mr. Shaheen's former attorney, a sworn copy of Mr. Shaheen's answers was promised. It has not yet been received. Question 56 of the above information subpoena stated in relevant part:

> "List, describe and state the location and the market value of any stocks, securities, . . . or other forms of equity, debt, or commodity investment in which you now have and/or have had an interest."

Mr. Shaheen's answer to Question 56 states that the following shares of

stock are held by the respondent, Martin Rubin, Esq., 122 East 42nd Street, New York, N.Y. 10017:

1. 896,047 shares of stock of Can-Amera Export Refining Company Ltd.;

2. 30,000 shares of preferred stock and 252,248 shares of common stock of SNR Holdings, Inc.;

3. 100 shares of stock of Shaheen Natural Resources Co., Inc.;

4. 207,343 shares of stock of Founders Corporation;

5. 1,304 shares of stock of Macmillan Ring-Free Oil Co., Inc.; and

6. 95 shares of stock of Alberta Export Refining Co., Ltd.

The answer states that such shares are pledged under a Guaranty dated March 25, 1977, to Macmillan Ring-Free Oil Co., Inc., 90 Park Avenue, New York, New York 10016, which pledge is stated to be currently in effect, and identifies

Mr. Rubin as "Escrowee." The answer to Question 56 incorporates the answer to Question 130 which states in relevant part, "Do you own any corporations in part or wholly?" Mr. Shaheen's answer, in the form of an attached schedule, lists each of the corporations whose stock, listed above, is referred to in his answer to Question 56. It is clear from the above that John M. Shaheen is the owner of the shares in the possession of Martin Rubin and that Mr. Rubin's interest therein is purely custodial.

6. As his answer to Question 130 indicates, Mr. Shaheen owns the purported pledgee, Macmillan Ring-Free Oil Co., Inc. ("MRFO"). According to MRFO's Notice of Annual Meeting of Stockholders dated May 14, 1980, which was filed with the Securities

and Exchange Commission, pp. 1-7, attached hereto as Exhibit C, John M. Shaheen is the president and a control person of Macmillan Ring-Free Oil Co., Inc., owning, directly or beneficially, 41.9% of the common stock and 33.0% of the preferred stock of MRFO. The purported pledge, made at a time when John M. Shaheen was a defendant in this suit, appears to have been a device to retain control of the above described shares of stock while insulating them from Mr. Shaheen's creditors.

7. In a telephone conversation on October 17, 1980, Ronald Meister, Esq., of the firm of Kornstein, Meister & Veisz, attorneys for the respondent Martin Rubin, confirmed that Mr. Rubin is in possession of the above-described property as well as an additional 67 shares of common stock and 142 shares of

preferred stock of Macmillan Ring-Free Oil Col, Inc., all of which belong to John M. Shaheen.

8. On September 11, 1980, Clarkson issued an execution on the property of John M. Shaheen to the Sheriff of the City of New York, New York County Division. On information and belief, the sheriff served upon the respondent an execution with notice of levy on September 19, 1980 and a notice to garnishee on September 30, 1980. Pursuant to CPLR 5222, Clarkson caused a restraining notice to be served on the respondent Martin Rubin on September 10, 1980 by certified mail, return receipt requested, and on September 25, 1980 by personal service. Notwithstanding the above, Mr. Rubin has refused to deliver to the sheriff any of the property which he holds on

behalf of John M. Shaheen.

9. In a telephone conversation on October 17, 1980, Ronald Meister also informed me that Macmillan Ring-Free Oil Co., Inc. has instructed Mr. Rubin not to deliver Mr. Shaheen's stock to the sheriff and has notified him that, pursuant to a purported Guaranty Agreement, NRFO has given Mr. Shaheen 30 days from receipt of a letter of notice dated September 30, 1980 to cure a supposed breach of the said Agreement. The actions taken by MRFO appear to be part of a continuing attempt by the judgment debtor to retain control of the above described securities while placing them beyond the reach of the sheriff's levy. For this reason, Clarkson moves for an order in the form annexed requiring the respondent Martin Rubin to show cause why he

should not be required to deliver the above described securities to a receiver, if noe is appointed by the court on motion of Clarkson, or if none is appointed, to the Sheriff of the City of New York, New York County Division, and requiring the respondents to show cause why they should not be required to execute and deliver any documents necessary to effect the delivery.

10. No previous application for the relief sought herein has been made.

WHEREFORE, it is respectfully requested that the petition made by Clarkson be granted in all respects.

S/ Kevin D. Ashley
Kevin D. Ashley

Sworn to before me this
20 day of October, 1980
S/
Notary Public
NATHAN L. BORDEN
Notary Public, State of New York
No. 41-4677862
Qualified in Queens County

Certificate Filed in New York County
Commission Expires March 30, 1982

APPENDIX C

COUNSEL'S NOVEMBER 14, 1980 LETTER TO THE DISTRICT COURT, AND THE DISTRICT COURT"S MEMORANDUM OPINION

November 14, 1980

Honorable Richard Owen
United States District Judge
United States Courthouse
Room 2903
Foley Square
New York, New York 10007

Re: The Clarkson Company, Ltd. v. Martin Rubin and John M. Shaheen (Index No. 76 Civ. 1373)

Dear Judge Owen:

On November 7, 1980, Your Honor denied the motion of John M. Shaheen ("Shaheen") to dismiss the subject petition of The Clarkson Company, Ltd. ("Clarkson") from the bench without reading Mr. Shaheen's papers in support of the motion. There were no papers submitted in opposition, and indeed the motion was not even returnable until November 21, 1980. We respectfully

request that Your Honor reconsider that deicsion in view of the facts set forth hereinafter as well as in the moving papers.

The thrust of the relevant part of CPLR §5225 is that a judgment creditor may procure property in the hands of a third party only if it is alleged and proven that the judgment debtor himself is entitled to possession of that property. In other words, in order to state a claim upon which relief may be properly granted under CPLR §5225, Clarkson as judgment creditor must allege that Shaheen, judgment debtor, is entitled to possession of the subject stock.

Clarkson has failed to make the critical operative allegation required to state a cause of action. There exists then not even a speculative

basis upon which to conduct discovery, and it is utterly impossible to determine relevancy.

It is therefore respectfully requested that Your Honor reconsider the prior decision, and upon reconsideration, grant the subject motion to dismiss the petition or require that Clarkson allege substantive facts which would entitle it, if proven, to judgment.

Respectfully submitted,

SAXE, BACON & BOLAN, P.C.

Thomas A. Andrews

cc: WHITE & CASE
KORNSTEIN, MEISTER VEISZ
TRUBIN, SILLCOCKS, EDELMAN
& KNAPP

THE RESPONDING MEMORANDUM OPINION OF THE DISTRICT COURT WAS HANDWRITTEN ON THE FACE OF THE NOVEMBER 14, 1980 LETTER AND READS AS FOLLOWS:

"I have again reviewed Clarkson's petition. It states a claim whether the possessory interest of Macmillan Ring Free, asserted as a defense, is valid and enforceable under the circumstances of the pledge and Mr. Shaheen's ownership position in Macmillan are issues to be tried in the expedited hearing I have ordered. The application for reconsideration is therefore denied. So ordered, Richard Owen, U.S.D.J., 11/19/80."